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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL K. PORTER,

Defendant and Appellant.

B165955

(Los Angeles County
Super. Ct. No. TA066887)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Gary R. Hahn, Judge. Affirmed.

Kathleen M. Redmond, under appointment for the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Susan D. Martynec, Deputy Attorneys General, for Plaintiff and Respondent.

Samuel K. Porter appeals from the judgment entered following his conviction of second degree robbery with a firearm use finding. He contends the trial court erred by admitting into evidence an extrajudicial eyewitness identification. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Porter (appellant) entered a donut shop with a gun and threatened to shoot employee Nancy Cardenas before leaving with money from the cash register. Officer Escobar and his partner responded to a radio call, interviewed Cardenas, and watched a videotape of the robbery on the shop's surveillance camera. Officer Escobar recognized the suspect as someone he had seen en route to the donut shop. He drove back, found the suspect, appellant, still there, and took him into custody.

Officer Smith took Cardenas to the scene of appellant's arrest. She identified him as the robber in a field show-up.

The jury found appellant guilty of second degree robbery and using a firearm to commit the crime. In a bifurcated proceeding, the trial court found he had served two separate prison terms for a felony. He was sentenced to an aggregate state prison term of 15 years. This timely appeal followed.

DISCUSSION

Before trial, appellant, acting in propria persona,¹ moved to exclude Cardenas's extrajudicial identification on the ground the field show-up was unduly suggestive and thus tainted her in-court identification of appellant. The trial court held an evidentiary hearing on the motion. Appellant presented the testimony of Cardenas, Officer Escobar,

¹ Appellant represented himself throughout this case.

and Jack Smith, a former police officer and trial consultant.² The trial court denied the motion.

On appeal, appellant contends the trial court committed reversible error because the field show-up was impermissibly suggestive.

Standard of Review

An extrajudicial identification procedure violates a defendant's due process rights if it is so impermissibly suggestive it creates a very substantial likelihood of irreparable misidentification, i.e., it “suggests in advance of identification by the witness the identity of the person suspected by the police.”³ A single person show-up is not inherently unfair and is justified when police wish to eliminate a detainee and continue to search for the perpetrator of the crime.⁴ The defendant bears the burden of proving an unfair identification procedure.⁵

Even where the defendant proves the identification procedure was impermissibly suggestive, evidence of the identification or subsequent identifications is not excluded if the People can prove the identification was nonetheless reliable.⁶ In determining the reliability of an identification following an impermissibly suggestive identification procedure, the court should consider factors such as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy

² Appellant also called other officers and his defense investigator as witnesses at the hearing. However, the court determined their testimony was not relevant to the motion.

³ *People v. Sanders* (1990) 51 Cal.3d 471, 508; *People v. Hunt* (1977) 19 Cal.3d 888, 894.

⁴ *People v. Hunt, supra*, 19 Cal.3d at page 893.

⁵ *People v. Ochoa* (1998) 19 Cal.4th 353, 412; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.

⁶ *People v. Gordon* (1990) 50 Cal.3d 1223, 1242, overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787.

of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the time between the crime and the confrontation.⁷

Our task on appeal is to review the totality of the circumstances, resolve all evidentiary conflicts in favor of the trial court's finding, and uphold the finding if substantial evidence supports it.⁸

Waiver

At the outset, we note the issue at the evidentiary hearing was the reliability of the extrajudicial identification procedure, not the reliability of Cardenas's identification, itself. No evidence was introduced at the pretrial hearing from which the trial court could have assessed the reliability of Cardenas's identification under the totality of circumstances. Nor did appellant raise the issue during trial. Nevertheless, appellant appears to contest the reliability of both the identification procedure and the identification by relying on trial evidence. However, the challenge to the reliability of the identification is waived because it was not raised in the trial court. Our review of the propriety of the trial court's ruling on the reliability of the identification procedure is based solely on the hearing evidence.⁹

Evidentiary Hearing

Cardenas testified officers spoke with her after the robbery and viewed with her the surveillance videotape at the donut shop. Officers subsequently told Cardenas they had found a man who fit the same, or some of the, characteristics as the robber, but they were not sure it was him. She did not interpret this statement as an indirect way of

⁷ *People v. Gordon, supra*, 50 Cal.3d at page 1242; accord *People v. Carpenter* (1997) 15 Cal.4th 312, 366-367; *People v. Wash* (1993) 6 Cal.4th 215, 244.

⁸ *People v. Wimberly* (1992) 5 Cal.App.4th 773, 788.

⁹ Cf. *In re Michael L.* (1985) 39 Cal.3d 81, 88 [the issue of a suggestive identification is waived if it is not raised in the trial court]; *People v. Fagalilo* (1981) 123 Cal.App.3d 524, 531 [the same].

informing her the police had caught the robber. Cardenas was advised she was not to assume just because appellant was in custody, he was the person who committed the robbery.

Officers took Cardenas to the scene of appellant's arrest. She saw him inside a police car. He was ordered to step out and emerged wearing handcuffs. Officers shined a light on appellant's face. Cardenas identified him as the robber after viewing him for about one minute. She noticed appellant was wearing the same pants and shoes he wore during the robbery but the shirt and jacket were gone. Cardenas told the officers, on a scale of one to ten as to her certainty appellant was the robber, she "was eight and a half to nine."

Officer Smith testified he gave Cardenas the field show-up admonishment police had a possible suspect detained, and he was taking her to the location for a field show-up to see if the person detained was involved in the crime. He also admonished just because the person was in handcuffs did not mean the person committed the crime. The handcuffs are just for safety purposes. He then asked Cardenas whether she understood the admonishment.

The Identification Procedure Was Not Unduly Suggestive

Based on the evidence adduced at the pretrial hearing, the trial court properly concluded the field show-up was not unduly suggestive. Before the field show-up, Cardenas was given the usual police field identification admonishment informing her the person detained might not be the robber, to be careful in making an identification and to be explicit to the officers how certain she was of the identification. She did not construe the admonishment as suggesting appellant was the robber. She was given ample time to make her identification and told the officers her level of certainty.

At the hearing, appellant argued, inter alia, the field show-up was impermissibly suggestive because he was handcuffed, surrounded by police and illuminated by a police spotlight and, before the show-up, police told Cardenas they had a suspect in custody.

However, these factors do not demonstrate the identification procedure was unduly suggestive or unreliable.¹⁰

The trial court did not err by admitting the evidence of the field identification procedure and leaving to the jury's consideration whether it tended to demonstrate appellant's guilt or innocence.

DISPOSITION

The judgment is affirmed.

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JOHNSON, Acting P. J.

We concur:

WOODS, J.

ZELON, J.

¹⁰ *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [during the predisplay admonishment, the officers said nothing unequivocal to suggest the witness would be viewing the attacker]; *In re Richard W.* (1979) 91 Cal.App.3d 960, 970 [the presence of police officers and use of handcuffs alone is not unduly suggestive]; *People v. Burns* (1969) 270 Cal.App.2d 238, 246 [identification made while a number of police officers were on the premises is not unduly suggestive].